

August 9, 2010

BY ELECTRONIC MAIL

Mr. Jeremy Olsen
Department of Homeland Security
Office of the Chief Procurement Officer
Acquisition Policy and Legislation Branch
245 Murray Drive, Bldg. 410 (RDS)
Washington, DC 20528

**RE: Revision of Department of Homeland Security Acquisition Regulation;
Limitations on Subcontracting in Emergency Acquisitions (HSAR Case
2009-005) 75 Federal Register 32723, June 9, 2010**

Dear Mr. Olsen,

The Office of Advocacy submits this comment letter to the Department of Homeland Security (DHS) in response to the above-referenced notice of proposed rulemaking.

I. Advocacy Background

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. Advocacy is an independent office within the Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or of the Administration. Section 612 of the Regulatory Flexibility Act (RFA)¹ requires Advocacy to monitor agency compliance with the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act.² The RFA requires agencies to analyze the economic impact of proposed regulations on small entities, and where there is likely to be a significant economic impact on a substantial number of small entities, to consider regulatory alternatives that will achieve the agency's goal while minimizing the burden on these small entities.³

In addition, under Executive Order 13272 agencies are required to give every appropriate consideration to comments provided by Advocacy.⁴ The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal

¹ Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

² Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

³ See generally, Office of Advocacy, U.S. Small Business Administration, A Guide for Federal Agencies: *How to Comply with the Regulatory Flexibility Act* (2003).

⁴ Exec. Order No. 13272 § 1, 67 Fed. Reg. 53461 (Aug. 16, 2002).

Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁵

II. Areas of Concern with the Proposed Contracting Regulation

The analysis used to determine that the regulation will not have a significant economic impact on a substantial number of small businesses is flawed. The fact that only ten small prime contractors would have been affected in 2008 is not determinative of whether the proposed rule will have a significant economic impact on a substantial number of small businesses. There are additional factors and questions that need to be considered. Although the ten small entities represented in 2008 data from the Federal Procurement Data System are from diverse industries, the relevant universe of small entities is the subset of small entities who are federal contractors and who are capable of bidding on emergency acquisitions. Once that number has been determined, DHS must determine the economic impact of the rule on these particular small entities, including costs associated with the limitation on subcontracting as well as any additional paperwork burden. In order to describe that impact, DHS could, for example, indicate how many contracting dollars were awarded to the 10 small prime contractors who did receive disaster-related cost-type contracts, and an estimate of how much less these small prime contractors would receive under the proposed rule. Would this be a significant impact? DHS should also determine what percentage of the contract costs the 10 small prime contractors subcontracted out on each contract action. What percentage of the 10 small businesses subcontracted out more than 65 percent on any contract? What type of work was subcontracted out by the 10 small businesses?

The proposed rule states that DHS does not anticipate "that the rule would significantly affect the total number of cost reimbursement acquisitions awarded to small entities." What data and analysis was used to reach this conclusion? Perhaps small businesses require more subcontracting in order to effectively compete for large disaster-related cost reimbursement contracts. Has this been considered?

Additionally, when the proposed rule says it applies to "a cost reimbursement contract or a task or delivery order" does this include all task and delivery orders or only those under cost reimbursement contracts? Does the FPDS data cited as "73 cost-type contract actions" include all task and delivery orders as well? If not, how many small businesses were awarded task and delivery orders of the type regulated under the proposed rule?

III. Recommendation:

Advocacy recommends that DHS revise its Certification and that it republish a revised Certification that provides a more complete analysis of the impact of this proposed rule on the relevant small businesses.

⁵ *Id.* at § 3(c).

Advocacy appreciates the opportunity to comment on DHS's Proposed Limitations on Subcontracting in Emergency Acquisitions Rule, (HSAR Case 2009-005).

Please feel free contact me or Major I. Clark (at (202) 205-7150 if you have any questions or require additional information.

Sincerely

Susan Walthall
Acting Chief Counsel for Advocacy

Major L. Clark, III
Assistant Chief Counsel for Procurement Policy

cc.: The Honorable Cass R. Sunstein, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget